

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Implementation of Section 621(a)(1) of the Cable
Communications Policy Act of 1984 as Amended
by the Cable Television Consumer Protection and
Competition Act of 1992
MB Docket No. 05-311

SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: September 24, 2018

Released: September 25, 2018

Comment Date: (30 days after date of publication in the Federal Register)
Reply Comment Date: (60 days after date of publication in the Federal Register)

By the Commission: Commissioner O’Rielly issuing a statement.

I. INTRODUCTION

1. In this Second Further Notice of Proposed Rulemaking (Second FNPRM), we address two issues raised by the remand from the United States Court of Appeals for the Sixth Circuit in Montgomery County, Md. et al. v. FCC, which addressed challenges to rules and guidance adopted by the Commission governing how local franchising authorities (LFAs) may regulate incumbent cable operators and cable television services.1 Specifically, we tentatively conclude that we should treat cable-related, “in-kind” contributions required by a franchising agreement as “franchise fees” subject to the statutory five percent cap on franchise fees set forth in Section 622 of the Communications Act of 1934, as amended (the Act), with limited exceptions.2 We also tentatively conclude that we should apply our prior mixed-use network ruling to incumbent cable operators, thus prohibiting LFAs from using their video franchising authority to regulate the provision of most non-cable services, such as broadband Internet access service, offered over a cable system by an incumbent cable operator. We seek comment on these tentative conclusions, which we believe faithfully interpret relevant statutory provisions and will promote competition by fostering parity between incumbents and new entrants and helping to ensure that local franchising requirements do not discourage cable operators from investing in new facilities and services. We also seek comment on whether the proposals and tentative conclusions discussed in this Second FNPRM, as well as prior Commission decisions in this proceeding addressing LFA regulation of cable operators, should be applied to state-level franchising actions and state regulations that impose requirements on local franchising.

1 Montgomery County, Md. et al. v. FCC, 863 F.3d 485 (6th Cir. 2017) (Montgomery County) (vacating and remanding (1) the Commission’s decision to treat cable-related, in-kind contributions as “franchise fees” subject to the statutory five percent cap on franchise fees set forth in 47 U.S.C. § 542, and (2) the Commission’s decision to extend its “mixed-use” ruling—which prohibits LFAs from regulating the provision of services other than cable services offered over cable systems used to provide both cable services and non-cable services—to incumbent cable operators that are not common carriers). A “franchising authority” is defined as “any governmental entity empowered by Federal, State, or local law to grant a franchise.” 47 U.S.C. § 522(10). References herein to “local franchising authorities” or “LFAs” mean only the county or municipal governmental entities empowered to grant franchises.

2 47 U.S.C. § 542. As discussed below, we propose to apply this treatment of cable-related, in-kind contributions to both incumbent cable operators and new entrants. See infra para. 22.

## II. BACKGROUND

2. Any entity seeking to offer “cable service” as a “cable operator” must comply with the cable franchising provisions of Title VI of the Communications Act.<sup>3</sup> Section 621(b)(1) of the Act prohibits a cable operator from providing cable service without first obtaining a cable franchise.<sup>4</sup> Section 621(a)(1) circumscribes the power of LFAs to award or deny such franchises.<sup>5</sup> As originally enacted by Congress as part of the 1984 Cable Act, Section 621(a)(1) simply stated that “[a] franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction.”<sup>6</sup> In a 1990 Report to Congress, however, the Commission concluded that in order “[t]o encourage more robust competition in the local video marketplace, the Congress should ... forbid local franchising authorities from unreasonably denying a franchise to potential competitors who are ready and able to provide service.”<sup>7</sup> In response to this Report, Congress revised Section 621(a)(1) in 1992 to provide that “[a] franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and *may not unreasonably refuse to award an additional competitive franchise.*”<sup>8</sup>

3. In 2007, finding that the existing operation of the local franchising process constituted an unreasonable barrier to new entrants<sup>9</sup> in the marketplace for cable services and to their deployment of broadband, the Commission issued the *First Report and Order*, which adopted new rules and guidance to implement Section 621(a)(1).<sup>10</sup> The Commission concluded that Section 621(a)(1) prohibits not only the ultimate unreasonable denial of a competitive franchise application, but also the establishment by LFAs of procedures and other requirements that have the effect of unreasonably interfering with the ability of a would-be competitor to obtain a competitive franchise.<sup>11</sup> To eliminate unreasonable barriers to entry into

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<sup>3</sup> *Id.* §§ 521-573.

<sup>4</sup> *Id.* § 541(b)(1).

<sup>5</sup> *Id.* § 541(a)(1).

<sup>6</sup> Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, § 621 (1984).

<sup>7</sup> *Competition, Rate Deregulation and the Commission’s Policies Relating to the Provision of Cable Television Service*, Report, 5 FCC Rcd 4962, 4974 (1990); *see also id.* at 5012 (“This Commission is convinced that the most effective method of promoting the interests of viewers or consumers is through the free play of competitive market forces.”).

<sup>8</sup> 47 U.S.C. § 541(a)(1) (emphasis added). *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (1992 Cable Act); *see also* S. REP. NO. 102-92, at 47 (1991) (“Based on the evidence in the record taken as a whole, it is clear that there are benefits from competition between two cable systems. Thus, the Committee believes that local franchising authorities should be encouraged to award second franchises. Accordingly, [the 1992 Cable Act] as reported, prohibits local franchising authorities from unreasonably refusing to grant second franchises.”).

<sup>9</sup> The term “new entrants” refers to entities that seek to obtain cable franchises to offer “cable service” over a “cable system” utilizing public rights-of-way and thus are defined under the Communications Act as “cable operator[s]” that must obtain a franchise. *First Report and Order*, 22 FCC Rcd at 5106 n.24.

<sup>10</sup> *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5102, para. 1 (2007) (*First Report and Order*), *aff’d sub nom. Alliance for Community Media et al. v. FCC*, 529 F.3d 763 (6th Cir. 2008) (*Alliance*), *cert. denied*, 557 U.S. 904 (2009). The Commission concluded that it had broad authority to promulgate rules implementing Title VI of the Act, including Section 621(a)(1), under Section 201(b) of the Act, which authorizes the Commission to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.” *Id.* at 5127-28, paras. 53-54. *See* 47 U.S.C. § 201(b).

<sup>11</sup> *First Report and Order*, 22 FCC Rcd at 5133, para. 64. The Commission found that it did not have a sufficient record to determine what constitutes an “unreasonable refusal to award an additional competitive franchise” under Section 621(a) with respect to franchising decisions where a state is involved, either by issuing franchises at the state

the marketplace for cable services and to encourage investment by new video entrants in broadband facilities, the Commission adopted rules and guidance construing the meaning of “unreasonable” for purposes of Section 621(a)(1), including rules and guidance governing the treatment of certain costs and fees charged to new entrants into the marketplace for cable services and the regulation of new entrants’ “mixed-use” networks (i.e., facilities used to provide both cable services and non-cable services).<sup>12</sup>

4. With respect to costs and fees, the Commission determined that unless certain specified costs, fees, and other compensation required by LFAs are counted toward the statutory five percent cap on franchise fees, an LFA’s demand for such fees could result in an unreasonable refusal to award a competitive franchise to a new entrant.<sup>13</sup> Under Section 622(b) of the Act, the amount of franchise fees that an LFA may collect from a cable operator for any twelve-month period is limited to five percent of the cable operator’s gross revenues derived in such period from the operation of the cable system to provide cable services.<sup>14</sup> Section 622(g)(2) sets forth certain exclusions from the term “franchise fee.”<sup>15</sup> In particular, Section 622(g)(2)(D) excludes “requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages.”<sup>16</sup> Such “incidental” requirements or charges may be assessed by an LFA without counting toward the five percent cap.<sup>17</sup> The Commission concluded that, with respect to franchise agreements for new entrants, non-incidental franchise-related costs required by LFAs must count toward the five percent franchise fee cap and provided guidance as to what constitutes such non-incidental franchise-related costs.<sup>18</sup> The Commission found that non-incidental costs include attorney fees and consultant fees, application or processing fees that exceed the reasonable cost of processing the application, acceptance fees, free or discounted services provided to an LFA, any requirement to lease or purchase equipment from an LFA at prices higher than market value, and in-kind payments.<sup>19</sup>

5. The Commission further found that in the context of some franchise negotiations, LFAs

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level or enacting laws governing specific aspects of the franchising process. *Id.* at 5102 n.2. It therefore expressly limited the findings and regulations adopted in the *First Report and Order* to actions or inactions at the local level where a state has not specifically circumscribed the LFA’s authority. *Id.*

<sup>12</sup> *Id.* at 5103, para. 5. In addition to the rules governing franchise fees and mixed-use networks discussed herein, the Commission adopted rules establishing reasonable time limits for LFAs to render a decision on a competitive applicant’s franchise application; prohibiting LFAs from refusing to award a competitive franchise because the applicant will not agree to unreasonable build-out requirements; and prohibiting LFAs from denying an application based upon a new entrant’s refusal to undertake certain obligations relating to public, educational, and government (PEG) channels and institutional networks (I-Nets). *Id.*

<sup>13</sup> *Id.* at 5123, para. 45, 5144-45, para. 94.

<sup>14</sup> 47 U.S.C. § 542(b). Advertising revenue and home shopping commissions have been included in a cable operator’s gross revenues for franchise fee calculation purposes. See *Texas Coalition of Cities for Utility Issues v. FCC*, 354 F.3d 802, 806 (5th Cir. 2003) (“A cable operator’s gross revenue includes revenue from subscriptions and revenue from other sources-e.g., advertising and commissions from home shopping networks.”).

<sup>15</sup> 47 U.S.C. § 542(g)(2).

<sup>16</sup> *Id.* § 542(g)(2)(D). Section 622(g) also excludes from the term “franchise fee” any tax, fee, or assessment of general applicability; in the case of any franchise in effect on October 30, 1984, payments which are required by the franchise to be made by the cable operator during the term of such franchise for, or in support of the use of PEG access facilities; in the case of any franchise granted after October 30, 1984, capital costs which are required by the franchise to be incurred by the cable operator for PEG access facilities; and any fee imposed under title 17 of the U.S. Code. *Id.* § 542(g)(2)(A)-(C), (E).

<sup>17</sup> *First Report and Order*, 22 FCC Rcd at 5147, para. 99.

<sup>18</sup> *Id.* at 5149, para. 104.

<sup>19</sup> *Id.*

have required from new entrants “in-kind” payments or contributions that are unrelated to the provision of cable services.<sup>20</sup> The Commission clarified that any requests for in-kind contributions made by LFAs unrelated to the provision of cable services by a new competitive entrant are subject to the statutory five percent franchise fee cap.<sup>21</sup>

6. Additionally, the Commission clarified that a cable operator may not be required to pay franchise fees on revenues from non-cable services.<sup>22</sup> As noted above, Section 622(b) provides that the “franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator’s gross revenues derived in such period from the operation of the cable system *to provide cable services.*”<sup>23</sup> The Commission noted that it had determined in the *Cable Modem Declaratory Ruling* that an LFA may not assess franchise fees on non-cable services, such as cable modem service, stating that “revenue from cable modem service would not be included in the calculation of gross revenues from which the franchise fee ceiling is determined.”<sup>24</sup> Although that decision related specifically to Internet access service revenues, the Commission concluded that the same would be true for other “non-cable” service revenues.<sup>25</sup>

7. Regarding mixed-use networks (i.e., networks that provide broadband, voice services, and other non-cable services in addition to video programming services), the Commission clarified that LFAs’ jurisdiction applies only to the provision of video programming services over new entrants’ cable systems.<sup>26</sup> To the extent that a new entrant provides non-cable services and/or operates facilities that do not qualify as a cable system, the Commission concluded that it is unreasonable for an LFA to refuse to award a franchise based on issues related to such services or facilities.<sup>27</sup> The Commission further clarified that an LFA may not use its video franchising authority to attempt to regulate a new entrant’s entire network beyond the provision of cable services.<sup>28</sup> The Commission found that “the provision of video services pursuant to a cable franchise does not provide a basis for customer service regulation by local law or franchise agreement of a cable operator’s entire network, or any services beyond cable

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<sup>20</sup> *Id.* at 5149, para. 105. The Commission cited the following as examples of in-kind contributions unrelated to the provision of cable services: traffic light control systems; a requirement to prepay \$1 million in franchise fees and to fund a \$50,000 scholarship; a \$13 million “wish list” in Tampa, Florida; a request for video hookup for a Christmas celebration and money for wildflower seeds in New York; and a request for fiber on traffic lights to monitor traffic in Virginia. *Id.* at 5149-50, paras. 106-7. In-kind contributions unrelated to the provision of cable services would also include, for example, requests by the LFA for free or discounted broadband Internet access service.

<sup>21</sup> *Id.* at 5150, para. 108.

<sup>22</sup> *Id.* at 5146, para. 98.

<sup>23</sup> 47 U.S.C. § 542(b) (emphasis added). The term “cable service” is explicitly defined in Section 602(6) to mean (i) “the one-way transmission to subscribers of video programming or other programming service,” and (ii) “subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.” *Id.* § 522(6).

<sup>24</sup> *First Report and Order*, 22 FCC Rcd at 5146, para. 98 (citing *Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4851 (2002) (*Cable Modem Declaratory Ruling*), *rev’d*, *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *rev’d*, *NCTA v. Brand X*, 545 U.S. 967 (2005)).

<sup>25</sup> *First Report and Order*, 22 FCC Rcd at 5146-47, para. 98.

<sup>26</sup> *Id.* at 5153, para. 121.

<sup>27</sup> *Id.* For example, the Commission found that it would be unreasonable for an LFA to refuse to grant a cable franchise to an applicant for resisting an LFA’s demands for regulatory control over non-cable services or facilities; to insist on an entity obtaining a separate cable franchise in order to upgrade non-cable facilities; to require a LEC to obtain a franchise solely for the purpose of upgrading its network; or to require a LEC to obtain a cable franchise if the LEC deploys fiber optic cable that can be used for cable and non-cable services. *Id.*

<sup>28</sup> *Id.* at 5155, para. 122.

services.”<sup>29</sup> The Commission based its decision on the common carrier exception to the definition of “cable system” in Section 602(7)(C) of the Act, which explicitly states that a common carrier facility subject to Title II is considered a cable system only “to the extent such facility is used in the transmission of video programming ....”<sup>30</sup> The Commission preempted local regulations that attempt to regulate any non-cable services offered by new entrants, finding that such regulations are beyond the scope of LFAs’ authority and inconsistent with Section 602(7)(C).<sup>31</sup>

8. The rules adopted in the *First Report and Order* applied only to new entrants applying for cable franchises.<sup>32</sup> Concurrently with its adoption of those rules, the Commission issued a *Further Notice of Proposed Rulemaking* seeking comment on whether to apply the findings in the *First Report and Order* to incumbent cable operators as they negotiate renewal of their existing franchise agreements, noting that many of these findings also appeared germane to existing franchisees.<sup>33</sup>

9. In the *Second Report and Order*, the Commission extended a number of the rules adopted in the *First Report and Order* to incumbent cable operators.<sup>34</sup> The Commission concluded that the findings in the *First Report and Order* interpreting Section 622 should apply equally to incumbents and new entrants because Section 622 “does not distinguish between incumbent providers and new entrants.”<sup>35</sup> Thus, the Commission found that in-kind contributions are not to be regarded as “incidental” and therefore must count toward the five percent franchise fee cap for incumbent cable operators.<sup>36</sup> The Commission further found that the clarification that a cable operator is not required to pay franchise fees on revenues from non-cable services applies to incumbent cable operators.<sup>37</sup> The Commission also determined that its findings on mixed-use networks provided in the *First Report and Order* should apply equally to incumbents and new entrants, noting that these findings relied on its statutory interpretation of “cable system” in Section 602(7)(C), which “does not distinguish between incumbent providers and new entrants.”<sup>38</sup> The Commission thus clarified that LFAs’ jurisdiction over incumbent cable operators applies only to the provision of cable services over cable systems and that an LFA may not use its franchising authority to regulate non-cable services offered by incumbent cable operators.<sup>39</sup>

10. The Sixth Circuit Court of Appeals subsequently issued a decision rejecting LFA challenges to the *First Report and Order*.<sup>40</sup> With respect to franchise fees charged to new entrants, the court upheld the Commission’s listing of the non-incidental charges that fall within the purview of the

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*; 47 U.S.C. § 522(7)(C).

<sup>31</sup> *First Report and Order*, 22 FCC Rcd at 5155, para. 122.

<sup>32</sup> *Id.* at 5164, para. 139.

<sup>33</sup> *Id.* at 5165, para. 140. The term “incumbent cable operator” refers to a cable operator that provided service before any other cable operator entered the market.

<sup>34</sup> *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order, 22 FCC Rcd 19633, para. 1 (2007) (*Second Report and Order*).

<sup>35</sup> *Id.* at 19637, para. 11.

<sup>36</sup> *Id.* at 19638, para. 11.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 19640-41, para. 17.

<sup>39</sup> *Id.*

<sup>40</sup> *Alliance*, 529 F.3d at 766. The court in *Alliance* affirmed the Commission’s authority to adopt rules interpreting Section 621(a)(1) of the Act. *Id.* at 774 (“conclud[ing] that, pursuant to section 201(b), the FCC possesses clear jurisdictional authority to formulate rules and regulations interpreting the contours of section 621(a)(1).”).

statutory five percent franchise fee cap, which includes in-kind payments.<sup>41</sup> The court found that the Commission's interpretation of the phrase "incidental to" in Section 622(g)(2)(D) of the Act was reasonable and therefore was entitled to deference under *Chevron*.<sup>42</sup>

11. In 2015, the Commission issued an order responding to several LFA petitions for reconsideration of the *Second Report and Order*.<sup>43</sup> LFAs challenged the inclusion of in-kind payments in calculating the franchise fee cap for incumbent cable operators, arguing that the Commission's findings in the *Second Report and Order* give an overly expansive scope to Section 622(g)(2)(D) and expanded the definition of in-kind payments set forth in the *First Report and Order*.<sup>44</sup> The Commission disagreed, finding that the *Second Report and Order* merely extended the *First Report and Order*'s conclusions regarding application of the term "incidental" in Section 622(g)(2)(D) to incumbent cable operators.<sup>45</sup> The Commission also rejected LFAs' arguments that the *First Report and Order* included in the franchise fee cap only in-kind payments that are unrelated to cable service, not in-kind payments that are related to cable service.<sup>46</sup> The Commission observed that in a section entitled "Charges incidental to the awarding or enforcing of a franchise," the *First Report and Order* identified "free or discounted services provided to an LFA" as one type of "non-incidental" cost that counted toward the franchise fee cap.<sup>47</sup> The Commission explained that in that context, the *First Report and Order* was referring to free or discounted cable services.<sup>48</sup> The Commission further found that consistent with the *First Report and Order*, the *Second Report and Order* noted that non-incidental in-kind payments must count toward the five percent franchise fee cap for incumbent cable operators and did not expressly limit this requirement to in-kind payments that are unrelated to cable service.<sup>49</sup>

12. The *Order on Reconsideration* also declined to modify the conclusions in the *Second Report and Order* regarding mixed-use networks.<sup>50</sup> The Commission observed that the *Second Report and Order* extended the Commission's findings on mixed-use networks to incumbent cable operators, clarifying that LFAs' jurisdiction over incumbent cable operators is limited to the provision of cable services over cable systems and that LFAs may not use their franchising authority to regulate non-cable services provided by incumbent cable operators.<sup>51</sup> The Commission rejected the LFAs' argument that the legislative history of the 1984 Cable Act indicates that they have authority over cable systems in their provision of non-cable services, explaining that while the legislative history discusses what constitutes a

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<sup>41</sup> *Id.* at 782-83.

<sup>42</sup> *Id.* at 783. See *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The court also upheld the Commission's rules establishing time limits for LFAs to award a cable franchise to a new entrant; placing limits on the use of build-out requirements as a franchise term for new entrants; and interpreting the "capital costs" that LFAs may require new entrants to incur for PEG access facilities. *Alliance*, 529 F.3d at 778-86.

<sup>43</sup> *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Order on Reconsideration, 30 FCC Rcd 810, 810, para. 1 (2015) (*Order on Reconsideration*).

<sup>44</sup> *Order on Reconsideration*, 30 FCC Rcd at 814-15, para. 11.

<sup>45</sup> *Id.* at 815, para. 12.

<sup>46</sup> *Id.* at 815, para. 13.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* The Commission stated that the *First Report and Order* discussed in-kind payments for non-cable services in a separate section entitled "In-kind payments unrelated to provision of cable service." *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 816, para. 14.

<sup>51</sup> *Id.* at 816-17, para. 15

cable service, it does not address whether localities may regulate non-cable services provided over cable systems.<sup>52</sup>

13. In *Montgomery County*, the Sixth Circuit Court of Appeals addressed challenges by LFAs to the *Second Report and Order* and the *Order on Reconsideration*.<sup>53</sup> The court rejected LFA arguments that non-cash exactions are not “franchise fees” as defined by Section 622(g)(1), noting that Section 622(g)(1) defines “franchise fee” to include “any tax, fee, or assessment of any kind” and that the terms “tax” and “assessment” can include nonmonetary exactions.<sup>54</sup> The court found, however, that the fact that the term “franchise fee” can include in-kind contributions “does not mean that it necessarily does include every one of them.”<sup>55</sup> The court concluded that the Commission failed to offer any explanation in the *Second Report and Order* or in the *Order on Reconsideration* as to why Section 622(g)(1) allows it to treat cable-related, “in-kind” exactions as franchise fees.<sup>56</sup> LFAs had claimed that the Commission’s interpretation would limit their ability to enforce statutory requirements for PEG channel capacity and for build-out obligations in low-income areas, and the court noted that the Commission’s orders did not reflect any consideration of this LFA concern.<sup>57</sup> The court also stated that the FCC failed to define what “in-kind” means.<sup>58</sup> The court therefore vacated as arbitrary and capricious the *Second Report and Order* and the *Order on Reconsideration* to the extent that they treat cable-related, “in-kind” exactions as “franchise fees” under Section 622(g)(1).<sup>59</sup> The court directed the Commission to determine and explain on remand to what extent cable-related, in-kind contributions are “franchise fees” under the Act.<sup>60</sup>

14. The court in *Montgomery County* also agreed with LFAs that neither the *Second Report and Order* nor the *Order on Reconsideration* offer a valid statutory basis for the application of the mixed-use ruling to bar LFAs from regulating the provision of non-telecommunications services by incumbent cable operators.<sup>61</sup> The court stated that the Commission’s decision in the *First Report and Order* to apply

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<sup>52</sup> *Id.* at 817, para. 15 & n.65. The *Order on Reconsideration* also clarified that the Commission’s findings in the *Second Report and Order* regarding franchise fees and mixed-use networks were intended to apply only to the local franchising process and not to franchising laws or decisions at the state level. *Id.* at 812-13, para. 7. The Commission stated that if any interested parties believe that the Commission should revisit this issue in the future, they could present the Commission with evidence that the findings in the *First Report and Order* and/or the *Second Report and Order* are of practical relevance to the franchising process at the state-level. *Id.*

<sup>53</sup> *Montgomery County*, 863 F.3d at 487.

<sup>54</sup> *Id.* at 490-91.

<sup>55</sup> *Id.* at 491.

<sup>56</sup> *Id.* The court found that the *Order on Reconsideration* incorrectly asserted that the *First Report and Order* had already treated “in-kind” cable-related exactions as franchise fees and that the Sixth Circuit had approved such treatment in *Alliance*. *Id.* at 490. The court stated that the Sixth Circuit’s decision in *Alliance* analyzed and approved only the FCC’s interpretation of the term “incidental” as used in Section 622(g)(2)(D) and did not address the idea that every non-incidental cost or expense that a cable operator bears in complying with the terms of its franchise is a “franchise fee” under Section 622(g)(1). *Id.* The court also found that the *First Report and Order* did not make clear that cable-related exactions are “franchise fees” under Section 622(g)(1). *Id.* In this regard, the court pointed out that the Commission specifically told the Sixth Circuit in *Alliance* that the *First Report and Order*’s “analysis of in-kind payments was expressly limited to payments that do not involve the provision of cable service.” *Id.*

<sup>57</sup> *Id.* at 491.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 491-92.

<sup>60</sup> *Id.* at 492.

<sup>61</sup> *Id.* at 493. The court noted that the LFAs’ primary concern with the mixed-use ruling is that it would prevent them from regulating “institutional networks” or “I-Nets”—communication networks which are constructed or operated by the cable operator and which are generally available only to subscribers who are not residential customers—even though the Act makes clear that LFAs may regulate I-Nets. *Id.* at 492; see 47 U.S.C. §§ 531(b)

the mixed-use ruling to new entrants had been defensible because Section 602(7)(C) of the Act expressly states that LFAs may regulate Title II carriers only to the extent that they provide cable services and the Commission found that new entrants generally are Title II carriers.<sup>62</sup> The court observed that in extending the mixed-use ruling to incumbent cable operators in the *Second Report and Order*, the Commission merely relied on the *First Report and Order*'s interpretation of Section 602(7)(C), noting that Section 602(7)(C) "does not distinguish between incumbent providers and new entrants."<sup>63</sup> The court found, however, that this reasoning is not an affirmative basis for the Commission's decision in the *Second Report and Order* to apply the mixed-use ruling to incumbent cable operators because Section 602(7)(C) by its terms applies only to Title II carriers and "many incumbent cable operators are not Title II carriers."<sup>64</sup> The court further found that the *Order on Reconsideration* did not offer any statutory explanation for the Commission's decision to extend the mixed-use ruling to incumbent cable operators.<sup>65</sup> Accordingly, the court concluded that the Commission's extension of the mixed-use ruling to incumbent cable operators that are not common carriers was arbitrary and capricious.<sup>66</sup> The court vacated the mixed-use ruling as applied to those incumbent cable operators and remanded for the Commission "to set forth a valid statutory basis, if there is one, for the rule as so applied."<sup>67</sup>

15. As we address the court's remand in this proceeding, we view the proposals discussed below as part of the Commission's larger, ongoing effort to reduce regulatory barriers to infrastructure investment. For example, the Commission's open wireline and wireless infrastructure proceedings have advanced a number of regulatory reforms to spur wireline and wireless service deployment, and additional reforms remain under consideration for future Commission action. In the wireline proceeding, the Commission has already enacted numerous reforms to our rules and procedures regarding pole attachments, copper retirement, and discontinuances of legacy services that will better enable providers to invest in next-generation networks.<sup>68</sup> In the wireless proceeding, to enable and to speed the deployment of advanced wireless services throughout the United States, we revised the rules and procedures for

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(authorizing franchising authorities to require as part of a franchise or franchise renewal that channel capacity on institutional networks be designated for educational or governmental use), 541(b)(3)(D) ("Except as otherwise permitted by sections 611 and 612, a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise"); see also *id.* § 531(f) (defining "institutional networks"). The court observed, however, that the Commission acknowledged that its mixed-use ruling was not meant to prevent LFAs from regulating I-Nets. *Montgomery County*, 863 F.3d at 492.

<sup>62</sup> *Id.* at 492-93.

<sup>63</sup> *Id.* at 493.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See generally *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment and Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, WT Docket No. 17-79, Third Report and Order and Declaratory Ruling, FCC 18-111 (rel. Aug. 3, 2018) (*Wireline Infrastructure Third Report and Order*); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, 32 FCC Rcd 11128 (2017). In addition, the Broadband Deployment Advisory Committee (BDAC), chartered in March 2017, has adopted several recommendations relating to state and local regulatory barriers, and federal siting, as well as a model municipal code and portions of a model state code. See FCC, Broadband Deployment Advisory Committee, Approved Recommendations, <https://www.fcc.gov/broadband-deployment-advisory-committee>. The BDAC is working to develop a complete model state code and recommendations regarding disaster response and recovery. See *id.* The BDAC's recommendations will inform the Commission's policymaking going forward.

deployments subject to the National Historic Preservation Act and National Environmental Policy Act.<sup>69</sup> We also made changes to the historic preservation review requirement for replacement utility poles,<sup>70</sup> and have sought comment on a proposal that would make existing infrastructure available for additional wireless deployments on towers that previously have been unavailable.<sup>71</sup> Similarly, with this item, we seek to faithfully interpret the statutory provisions at issue in a way that preserves incentives for all cable operators to deploy infrastructure that can be used to provide numerous services, including video, voice, and broadband Internet access service, to consumers.

### III. DISCUSSION

#### A. Cable-Related, In-Kind Contributions

16. We tentatively conclude that we should treat cable-related, in-kind contributions required by LFAs from cable operators as a condition or requirement of a franchise agreement as “franchise fees” subject to the statutory five percent franchise fee cap set forth in Section 622 of the Act, with limited exceptions as described below.<sup>72</sup> We tentatively conclude that this interpretation is most consistent with the statutory language and legislative history and seek comment on our analysis.

17. Section 622(b) directs that “the franchise fees paid by a cable operator” for any 12-month period “shall not exceed 5 percent of such cable operator’s gross revenues.”<sup>73</sup> Section 622(g)(1) defines “franchise fee” broadly to include “any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator . . . solely because of their status as such.”<sup>74</sup> The court in *Montgomery County* acknowledged that the term “franchise fee” can include in-kind contributions, but stated that further explanation was necessary in order for the Commission to conclude that *cable-related*, in-kind contributions are covered within the definition.<sup>75</sup> We note that the broad definition of “franchise fee” in the statute covers “any kind” of tax, fee, or assessment, without distinguishing between whether it is related or unrelated to the provision of cable service.<sup>76</sup> The legislative history, in discussing the definition of “franchise fee,” likewise suggests no such distinction was intended by Congress.<sup>77</sup> The court’s decision in *Montgomery County* did not disturb the Commission’s treatment of in-kind contributions unrelated to the provision of cable services as franchise fees subject to the statutory five percent cap.<sup>78</sup> We see no basis in the statute or legislative history for distinguishing between in-kind contributions unrelated to the provision of cable services and cable-related, in-kind contributions for purposes of the five percent franchise fee cap. If in-kind contributions

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<sup>69</sup> See generally *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, FCC 18-30 (Mar. 30, 2018) (concluding that that small wireless facilities are not “undertakings” or “major federal actions,” clarifying the process for Tribal participation in reviews of large wireless facilities, removing the requirement that applicants prepare an Environmental Assessment (EA) when a proposed project would be located in a floodplain, and committing to specific timelines for Commission review of EAs).

<sup>70</sup> See generally *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, 32 FCC Rcd 9760 (2017).

<sup>71</sup> See generally *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Public Notice, 32 FCC Rcd 10715 (2017).

<sup>72</sup> See *infra* para 19.

<sup>73</sup> 47 U.S.C. § 542(b).

<sup>74</sup> *Id.* § 542(g)(1) (emphasis added).

<sup>75</sup> *Montgomery County*, 863 F.3d at 490-91.

<sup>76</sup> 47 U.S.C. § 542(g)(1).

<sup>77</sup> H.R. Rep. No. 934, 98<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 1984 at 64, reprinted in 1984 U.S.C.C.A.N. 4655, 4701 (H.R. Rep. 98-934) (“Franchise fee is defined by subsection 622(g) to include any tax, fee, or assessment imposed on a cable operator or subscribers solely because of their status as such”).

<sup>78</sup> *Montgomery County*, 863 F.3d at 490-491. See also *First Report and Order*, 22 FCC Rcd at 5149, para. 105.

unrelated to the provision of cable services were not treated as franchise fees, LFAs could easily evade the five percent cap by requiring any manner of in-kind contributions, rather than a monetary fee. Likewise, if cable-related, in-kind contributions are not counted as franchise fees, LFAs could circumvent the five percent cap by requiring, for example, unlimited free or discounted cable services and facilities for LFAs, in addition to a five percent franchise fee. We believe this result would be contrary to Congress's intent as reflected in the broad definition of "franchise fee" in the statute. We seek comment on this analysis.

18. Section 622(g)(2) sets forth five exclusions from the term "franchise fee."<sup>79</sup> To begin with, Section 622(g)(2)(A) excludes "any tax, fee, or assessment of general applicability."<sup>80</sup> The legislative history explains that a tax, fee, or assessment of general applicability includes "such payments as a general sales tax, an entertainment tax imposed on other entertainment businesses as well as the cable operator, and utility taxes or utility user taxes."<sup>81</sup> By definition, a tax, fee, or assessment of *general applicability* does not cover *cable-related*, in-kind contributions. Thus, we tentatively conclude the exclusion set forth in subsection (A) is not applicable here. Additionally, Section 622(g)(2)(E) excludes fees imposed under the Copyright Act under title 17, United States Code,<sup>82</sup> and thus does not appear to apply to cable-related, in-kind contributions. Furthermore, Section 622(g)(2)(D) excludes "requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages."<sup>83</sup> Although the statute does not define the term "incidental," based on the interpretive canon of *noscitur a sociis*,<sup>84</sup> the exemplary list delineated within the text of the provision—*i.e.*, "bonds," "security funds," "letters of credit," "insurance," "indemnification," "penalties," and "liquidated damages"<sup>85</sup>—suggests that the term refers to costs or requirements related to assuring that a cable operator is financially and legally qualified to operate a cable system, not to cable-related, in-kind contributions. The legislative history similarly explains that a "franchise fee is defined so as not to include any bonds, security funds, or other incidental requirements for costs necessary to the enforcement of the franchise."<sup>86</sup> The court in *Alliance* upheld the Commission's determination that under Section 622(g)(2)(D), the term "incidental" is "limited to the list of incidentals in the statutory provision, as well as other minor expenses."<sup>87</sup> The Commission has determined that non-incidental costs required by LFAs must count toward the five percent franchise fee cap.<sup>88</sup> The *First Report and Order* listed various examples of non-incidental costs, including in-kind

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<sup>79</sup> 47 U.S.C. § 542(g)(2)(A)-(E).

<sup>80</sup> *Id.* § 542(g)(2)(A) (excluding from the definition of "franchise fee" "any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services, but not including a tax, fee, or assessment which is unduly discriminatory against cable operators or cable subscribers") (emphasis added)).

<sup>81</sup> H.R. Rep. No. 98-934, 1984 U.S.C.C.A.N. at 4701.

<sup>82</sup> 47 U.S.C. § 542(g)(2)(E) (excluding from the definition of "franchise fee" "any fee imposed under title 17, United States Code"). See also H.R. Rep. No. 98-934, 1984 U.S.C.C.A.N. at 4701 ("any fee imposed under the Copyright Act would not be considered a franchise fee").

<sup>83</sup> 47 U.S.C. § 542(g)(2)(D).

<sup>84</sup> See *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (the principle of *noscitur a sociis*—"a word is known by the company it keeps"—"avoid[s] ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to Acts of Congress").

<sup>85</sup> 47 U.S.C. § 542(g)(2)(D).

<sup>86</sup> H.R. Rep. No. 98-934, 1984 U.S.C.C.A.N. at 4701.

<sup>87</sup> *Alliance*, 529 F.3d at 782-83; see also *First Report and Order*, 22 FCC Rcd at 5148, para. 103.

<sup>88</sup> *First Report and Order*, 22 FCC Rcd at 5149, para. 104.

payments unrelated to provision of cable service.<sup>89</sup> For the reasons stated above, we tentatively conclude that cable-related, in-kind contributions, such as free or discounted cable services demanded by an LFA,<sup>90</sup> likewise do not qualify as “incidental” charges under the exclusion in subsection (D). We seek comment on this analysis.

19. Additionally, Section 622(g)(2)(B) contains an exclusion for PEG support payments,<sup>91</sup> but only with respect to franchises granted *prior* to 1984.<sup>92</sup> To the extent that any such franchises are still in effect, we tentatively conclude that under Section 622(g)(2)(B), PEG support payments made pursuant to such franchises are cable-related, in-kind contributions excluded from the five percent franchise fee cap. We seek comment on this tentative conclusion. Finally, for any franchise granted after 1984, Section 622(g)(2)(C) contains a narrow exclusion covering PEG “capital costs which are required by the franchise.”<sup>93</sup> The legislative history explains that with “regard[] [to] PEG access in new franchises, payments for capital costs required by the franchise to be made by the cable operator are not defined as fees under this provision.”<sup>94</sup> The court in *Alliance* affirmed the Commission’s interpretation of the exemption in Section 622(g)(2)(C) as being limited to “those costs incurred in or associated with the construction of PEG access facilities.”<sup>95</sup> Accordingly, under the statute, for purposes of franchises granted after 1984, we tentatively conclude that PEG capital costs required by the franchise are in-kind, cable-related contributions excluded from the five percent cap. We seek comment on the above analysis.

20. We tentatively conclude that treating cable-related, in-kind contributions as “franchise fees” would not undermine provisions in the Act that authorize or require LFAs to impose cable-related obligations on franchisees. We note, in this regard, that the Act authorizes LFAs to require that channel capacity be designated for PEG use and that channel capacity on I-Nets be designated for educational and

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<sup>89</sup> *Id.*

<sup>90</sup> *See infra* para. 24 (seeking comment on a proposed definition of “cable-related, in-kind contribution”).

<sup>91</sup> Section 611 of the Act authorizes LFAs to establish PEG requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use. 47 U.S.C. § 531. The legislative history explains that PEG channels provide third-party access to cable systems through channels dedicated for use by the public and certain program providers, such as local governments, schools and non-profit and community groups. H.R. Rep. No. 98-934, 1984 U.S.C.C.A.N. at 4667.

<sup>92</sup> 47 U.S.C. § 542(g)(2)(B) (excluding from the term “franchise fee” “*in the case of any franchise in effect on the date of the enactment of this title*, payments which are required by the franchise to be made by the cable operator during the term of such franchise for, or in support of the use of, public, educational, or governmental access facilities”) (emphasis added). Section 622 was enacted as part of the 1984 Cable Act. *See First Report and Order*, 22 FCC Rcd at 5151, para. 109 (“While Section 622(g)(2)(B) excluded from the term franchise fee any such payments made in support of PEG facilities, it only applies to any franchise in effect on the date of enactment. Thus, for any franchise granted after 1984, this exemption from franchise fees no longer applies”).

<sup>93</sup> 47 U.S.C. § 542(g)(2)(C) (excluding from the term “franchise fee” “in the case of any franchise granted after such date of enactment, capital costs which are *required* by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities”) (emphasis added). Section 611 of the Act authorizes a franchising authority to require a cable operator, as part of a franchise, to designate channel capacity for public, educational, or governmental [PEG] use. *Id.* § 531.

<sup>94</sup> H.R. Rep. No. 98-934, 1984 U.S.C.C.A.N. at 4702.

<sup>95</sup> *Alliance*, 529 F.3d at 784 (finding “the FCC’s limitation of ‘capital costs’ to those ‘incurred in or associated with the construction of PEG access facilities’ represents an eminently reasonable construction of section 622(g)(2)(C)”). *See also id.* (observing that the Commission’s “central test for determining whether an expense is a capital cost is whether it is ‘incurred in or associated with the construction of PEG access facilities’ and that “[t]his definition could potentially encompass the cost of purchasing equipment, as long as that equipment relates to the construction of actual facilities”). We understand that costs for studio equipment are treated as capital costs for purposes of section 622(g)(2)(C) by both cable operators and LFAs given that most PEG facilities are already constructed. We seek comment on this practice.

governmental use.<sup>96</sup> The fact that the Act authorizes LFAs to impose such obligations does not, however, mean that the value of these obligations should be excluded from the five percent cap on franchise fees. Indeed, the statute suggests otherwise. Section 622(g)(2) carves out only limited exclusions for PEG-related costs—*i.e.*, PEG support payments required by any franchise granted prior to 1984 and PEG capital costs required by any franchise granted after 1984.<sup>97</sup> Section 622(g)(2) makes no mention of an I-Net-related exclusion, nor does it contain a general exclusion for *all* PEG related costs. Since Congress enacted the PEG and I-Net provisions<sup>98</sup> at the same time it added the franchise fee provisions,<sup>99</sup> it could have explicitly excluded those costs in addressing the scope of the PEG-related costs in that subsection if it had intended they not count toward the cap. Based on this, we tentatively find that treating all cable-related, in-kind contributions as “franchise fees,” unless expressly excluded by the statute, would best effectuate the statutory purpose.<sup>100</sup> To the extent that an LFA wishes to impose such obligations, the LFA can count the value of the services or facilities towards the cable operator’s franchise fee payment, if the services or facilities are not exempt from the franchise fee cap in Section 622(g)(2). In our view, an LFA should not be permitted to make an end run around the statutory cap by requiring a cable operator to pay franchise fees equal to five percent of its gross revenues for cable services and also assume the costs of cable-related, in-kind contributions. We seek comment on this view.

21. LFAs have previously suggested that our proposed interpretation would treat as franchise fees all costs related to franchise requirements, even those allowed under the Cable Act.<sup>101</sup> We disagree. For example, the Act directs LFAs “to assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides,” a mandate which may cause LFAs to impose build-out obligations on cable operators.<sup>102</sup> Although these obligations are not free for cable operators, we do not propose to interpret build-out obligations as contributions to the LFA. Because build-out obligations (unlike I-Net facilities) involve the construction of facilities that are not specifically for the use or benefit of the LFA or any other entity designated by the LFA, but rather are part of the provision of cable service in the franchise area and the facilities ultimately may result in profit to the cable operator, we do not think they should be considered contributions to an LFA. Under this approach, the cost that these obligations impose on cable operators would not count toward the five-percent franchise fee cap. We seek comment on this proposed interpretation. We also seek comment on whether there are other requirements besides build-out obligations that are not specifically for the use or benefit of the LFA or an entity designated the LFA and therefore should not be considered contributions to an LFA.

22. Additionally, we tentatively conclude that this treatment of cable-related, in-kind contributions should be applied to both new entrants and incumbent cable operators. As discussed above, in adopting rules and guidance implementing Section 621(a)(1), including rules governing the treatment of certain costs and fees charged by LFAs, the Commission found that the existing operation of the local

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<sup>96</sup> 47 U.S.C. §§ 531(b), 541(b)(3)(D).

<sup>97</sup> *Id.* §§ 542(g)(2)(B), (C).

<sup>98</sup> *See id.* § 531.

<sup>99</sup> *See id.* § 542.

<sup>100</sup> H.R. Rep. No. 98-934, 1984 U.S.C.C.A.N. at 4656-57 (describing the purposes of the legislation to include “defining and limiting the authority that a franchising authority may exercise through the franchise process,” establish[ing] franchise procedures and standards to encourage the growth and development of cable systems,” and “establish[ing] a national framework and federal standards for cable franchising ... [to] provide[] the cable industry with the stability and certainty that are essential to its growth and development...[endeavoring] to create an environment in which cable will flourish, providing all Americans access to a technology that will become an increasingly important part of our national communications network”).

<sup>101</sup> Reply to Oppositions to Petition for Reconsideration of City of Albuquerque et al., MB Docket No. 05-311, at 3 (filed Feb. 26, 2008), <https://ecfsapi.fcc.gov/file/6519843516.pdf>.

<sup>102</sup> 47 U.S.C. § 541(a)(3).

franchising process constituted an unreasonable barrier to new entrants in the marketplace for cable services and to their deployment of broadband.<sup>103</sup> Specifically, the Commission found that the local franchising process unreasonably delays new entrants from upgrading their networks to provide video services, which discourages investment in the fiber-based infrastructure necessary for the provision of broadband services by depriving new entrants of revenues needed to offset the costs of such deployment.<sup>104</sup> We acknowledge that this distinguishes new entrants from incumbent cable operators, who have already deployed their infrastructure for both video and broadband. Nevertheless, we believe that applying the same treatment of cable-related, in-kind contributions to both new entrants and incumbent cable operators would ensure a more level playing field and that the Commission should not place its thumb on the scale to give a regulatory advantage to any competitor. Moreover, as the Commission has previously observed, Section 622 “does not distinguish between incumbent providers and new entrants.”<sup>105</sup> We seek comment on this proposal.

23. We seek comment on the effect, if any, that our statutory interpretation would have on LFAs’ ability to impose cable-related, in-kind obligations on new entrants and incumbents consistent with the statutory provisions described above. To the extent that commenters assert that it would unreasonably hamper LFAs’ ability to impose such obligations, we request that they provide specific cost data or other information to support their position. Conversely, what effect, if any, would excluding cable-related, in-kind contributions from “franchise fees” (i.e., allowing LFAs to seek unlimited cable-related, in-kind contributions on top of the five percent franchise fee permitted by Section 622) have on new entrants and incumbents? Would such exclusion likely delay or deter infrastructure investment by new competitors? Would it affect incumbent cable operators’ ability to invest in new facilities and services, including improving broadband services? We also seek comment on the costs and benefits to consumers of our proposed treatment of cable-related, in-kind contributions.

24. We propose to define “cable-related, in-kind contributions” to include “any non-monetary contributions related to the provision of cable services provided by cable operators as a condition or requirement of a local franchise agreement, including but not limited to free or discounted cable services and the use of cable facilities or equipment. It does not include the cost of build-out requirements.” Under this proposed definition, cable-related, in-kind contributions would not have to be provided directly to the LFA to be subject to the statutory five percent cap; rather, any cable-related, in-kind contributions provided to the LFA or any other entity designated by the LFA<sup>106</sup> as a condition or requirement of a franchise agreement would be subject to the cap, if not expressly exempt under Section 622(g)(2). We seek comment on this proposed definition. We request commenters to provide examples of the types of cable-related, “in-kind” contributions that have been or are being required by LFAs. We further propose that cable-related, in-kind contributions be valued for purposes of the franchise fee cap at their fair market value. We seek comment on this proposal, and how such a market valuation should be performed. Alternatively, we seek comment on whether cable-related, in-kind contributions should be valued at the cost to the cable operator.

#### **B. Mixed-Use Networks**

25. We tentatively conclude that the mixed-use network ruling should be applied to incumbent cable operators to the extent that they offer or begin offering non-cable services. Thus, we propose to prohibit LFAs from using their video franchising authority to regulate most non-cable services

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<sup>103</sup> *First Report and Order*, 22 FCC Rcd at 5102, para. 1.

<sup>104</sup> *Id.* at 5103, para. 3.

<sup>105</sup> *Second Report and Order*, 22 FCC Rcd at 19637, para. 11.

<sup>106</sup> An entity designated by the LFA could include, for example, a school, a library, or a non-profit group that administers a public access channel.

offered over cable systems by incumbent cable operators.<sup>107</sup> Non-cable services offered by incumbent cable operators include telecommunications services and non-telecommunications services. Telecommunications services offered by incumbent cable operators may include, for example, some business data services.<sup>108</sup> Non-telecommunications services offered by incumbent cable operators may include information services, such as broadband Internet access services,<sup>109</sup> and private carrier services, such as certain types of business data services.<sup>110</sup> Incumbent cable operators may also offer facilities-based interconnected Voice over Internet Protocol (VoIP) service,<sup>111</sup> which has not been classified by the Commission as either a telecommunications service or an information service<sup>112</sup> but is clearly not a cable service. We seek comment on whether there are other services offered by incumbent cable operators that are not listed above that are relevant to our analysis.

26. As an initial matter, we note that the court in *Montgomery County* vacated the mixed-use rule only as applied to incumbent cable operators that are not common carriers.<sup>113</sup> The court, however, appears to have left undisturbed application of the mixed-use ruling to incumbent cable operators that are also common carriers.<sup>114</sup> As explained above, some incumbent cable operators provide

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<sup>107</sup> As discussed above, the court in *Montgomery County* noted that the Commission acknowledged that its mixed-use ruling was not meant to prevent LFAs from regulating I-Nets. See *supra* note 61. We reiterate that nothing in this Order is intended to limit LFAs' express authority under Section 611(b) of the Act, 47 U.S.C. § 531(b), to require I-Net capacity.

<sup>108</sup> Business data services refers to the dedicated point-to-point transmission of data at certain guaranteed speeds and service levels using high-capacity connections. *Business Data Services in an Internet Protocol Environment et al.*, Report and Order, 32 FCC Rcd 3459, 3463, para. 6 (2017) (*BDS Report and Order*). Businesses, non-profits, and government institutions use business data services to enable secure and reliable communications. *Id.* See Letter from Rick Chessen, Chief Legal Officer, Senior Vice President, Legal & Regulatory Affairs, NCTA – The Internet & Television Association, to Marlene H. Dortch, Secretary, FCC, at n.10 (May 3, 2018) (NCTA May 3, 2018 *Ex Parte* Letter) (indicating that some incumbent cable operators provide BDS on a common carrier basis).

<sup>109</sup> See *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2018) (*Restoring Internet Freedom Order*).

<sup>110</sup> See *BDS Report and Order*, 32 FCC Rcd at 3566-80, paras. 267-285.

<sup>111</sup> Interconnected VoIP is defined as a service that (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) requires Internet protocol-compatible customer premises equipment; and (4) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network. 47 CFR § 9.3.

<sup>112</sup> See, e.g., *Lifeline and Linkup Reform and Modernization*, Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962, 4059, para. 262 n.709 (2016) (“we have not generally classified VoIP as a telecommunications service or information service”); *IP-Enabled Services*, Report and Order, 24 FCC Rcd 6039, 6043, para. 8 n.21 (2009) (“The Commission to date has not classified interconnected VoIP service as a telecommunications service or information service as those terms are defined in the Act.”).

<sup>113</sup> *Montgomery County*, 863 F.3d at 493 (finding that “on the record now before us, the FCC’s extension of the mixed-use rule to incumbent cable providers that are not common carriers is arbitrary and capricious”).

<sup>114</sup> The court in *Montgomery County* explained:

The Communications Act bars franchising authorities from regulating the “services, facilities, and equipment provided by a cable operator except to the extent consistent with” the Act. [47 U.S.C.] § 544(a). The Act in turn permits authorities to impose various franchise requirements to the extent that those requirements are “related to the establishment or operation of a cable system[.]” [47 U.S.C.] § 544(b) (emphasis added). Section 522(7) defines a “cable system” as “a facility ... that is designed to provide cable service,” including video programming, “to multiple subscribers within a community [.]” [47 U.S.C.] § 522(7).

The Local Regulators admit that the FCC’s mixed-use decision is “defensible as applied to Title II carriers,” since the Act expressly states that local franchising authorities may regulate Title II carriers only to the extent they provide cable services. [47 U.S.C.] § 522(7).

telecommunications services over their facilities.<sup>115</sup> Under Section 3(51) of the Act, a “provider of telecommunications services” is a “telecommunications carrier,” which the statute directs “shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services.”<sup>116</sup> Thus, an incumbent cable operator, to the extent it offers telecommunications service, would be treated as a common carrier<sup>117</sup> subject to Title II of the Act.<sup>118</sup> Section 602(7)(C) of the Act, in turn, excludes from the term “cable system” “a facility of a common carrier which is subject, *in whole or in part*, to the provisions of title II of this Act, except that such facility shall be considered a cable system . . . to the extent such facility is used in the transmission of [cable service].”<sup>119</sup> Accordingly, to the extent that any incumbent cable operators offer any telecommunications services, we tentatively conclude that they are covered under the common carrier exception in Section 602(7)(C), and thus can be regulated by LFAs only to the extent they provide cable service.<sup>120</sup> Although we recognize that there are distinctions between the obstacles faced by new entrants and incumbent cable operators,<sup>121</sup> we see no basis in the statute to treat differently incumbent cable operators that are common carriers and new entrants that are common carriers for purposes of application of the common carrier exception. We thus tentatively conclude that the mixed-use network ruling prohibits LFAs from regulating the provision of any services other than cable services offered over the cable systems of incumbent cable operators that are common carriers, or from regulating any facilities and equipment used in the provision of any services other than cable services offered over the cable systems of incumbent cable operators that are common carriers (with the exception of I-Nets, as noted above).<sup>122</sup> We seek comment on this analysis and the tentative conclusions.

27. In addition, we seek comment on LFAs’ authority to regulate the provision of non-cable services by incumbent cable operators that are *not* also common carriers.<sup>123</sup> We request information on the extent to which incumbent cable operators are not also common carriers.<sup>124</sup> Are the incumbent cable operators that are also common carriers mostly the largest incumbent cable operators? Regarding non-cable services provided by incumbent cable operators that are not common carriers, we tentatively conclude that Section 624(b) of the Act prohibits LFAs from using their franchising authority to regulate

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*Id.* at 492.

<sup>115</sup> See *supra* para. 25.

<sup>116</sup> 47 U.S.C. § 153(51).

<sup>117</sup> *Id.* § 153(11) (defining the term “common carrier”).

<sup>118</sup> See Title II of the Communications Act of 1934, 47 U.S.C. § 201 *et seq.* (regulation of common carriers).

<sup>119</sup> 47 U.S.C. § 522(7)(C) (emphasis added).

<sup>120</sup> See *supra* note 116.

<sup>121</sup> See *supra* para. 22.

<sup>122</sup> See 47 U.S.C. § 522(7)(C) (providing that a common carrier facility subject to Title II is considered a cable system only “to the extent such facility is used in the transmission of video programming . . .”). See also *id.* §§ 541(b)(3)(B) (“A franchising authority may not impose any requirement . . . that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof.”), 541(b)(3)(D) (“Except as otherwise permitted by sections 611 and 612, a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise.”). See *supra* note 114.

<sup>123</sup> We also seek comment on LFAs’ authority to regulate a non-common carrier new entrant’s provision of information services.

<sup>124</sup> See *Montgomery County*, 863 F.3d at 493 (in the LFA’s view, most incumbent cable operators are not Title II carriers, and thus § 522(7)(C) does not apply).

the provision of information services, including broadband Internet access service.<sup>125</sup> Under Section 624(b), LFAs “may not . . . establish requirements for video programming or other information services.”<sup>126</sup> Section 624 does not define the term “information services,”<sup>127</sup> but the “definitions” section of the legislative history distinguishes “information service” from “cable service.”<sup>128</sup> The House Report states that “[a]ll services offered by a cable system that go beyond providing generally-available video programming or other programming are not cable services” and “a cable service may not include ‘active information services’ such as at-home shopping and banking that allow transactions between subscribers and cable operators or third parties.”<sup>129</sup> We also find significant that the description of “information services” contained in the 1984 Cable Act’s legislative history—*i.e.*, “services providing subscribers with the capacity to engage in transactions or to store, transfer, forward, manipulate, or otherwise process information or data [which] would not be cable services”<sup>130</sup>—corresponds closely to the 1996 Telecommunications Act’s definition of “information service”<sup>131</sup> contained in Section 3(24) of the Act—*i.e.*, “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”<sup>132</sup> For all the reasons stated above, we believe that for purposes of Section 624(b), interpreting “information services” to have the meaning set forth in Section 3(24) of the Act would best reflect Congressional intent. We further note that the Commission recently reinstated the “information service” classification of broadband Internet access service.<sup>133</sup> We seek comment on this analysis.

28. Based on the above analysis, we tentatively conclude that the statute also bars LFAs from regulating the provision of broadband Internet access and other information services by incumbent cable operators that are not common carriers.<sup>134</sup> Although Section 624(b)(2)(B) allows franchising authorities

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<sup>125</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 320-21, para. 26 (concluding that broadband Internet access service is an information service under the Act).

<sup>126</sup> 47 U.S.C. § 544(b). *See also id.* § 544(a) (barring LFAs from regulating the “services, facilities, and equipment provided by a cable operator except to the extent consistent with” the Act); *id.* § 556(c) (“any provision of law of any State, political subdivision, or agency thereof, or franchising authority . . . which is inconsistent with this [Act] shall be deemed to be preempted and superseded.”).

<sup>127</sup> *Id.* § 544. We note that the term “information services” predates the 1984 Cable Act. *See, e.g., United States v. AT&T*, 552 F. Supp 131, 178 (D.D.C. 1982) (“information services” defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information which may be conveyed via telecommunications. . .”), *aff’d sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

<sup>128</sup> H.R. Rep. No. 98-934, 1984 U.S.C.C.A.N. at 4705.

<sup>129</sup> *Id.*, 1984 U.S.C.C.A.N. at 4679 (emphasis added). *See also id.*, 1984 U.S.C.C.A.N. at 4681 (“Some examples of non-cable services would be: shop-at-home and bank-at-home services, electronic mail, one-way and two-way transmission on non-video data and information not offered to all subscribers, data processing, video-conferencing, and all voice communications”); *id.* (“Many commercial *information services* today offer a package of services, some of which (such as news services and stock listings) would be cable services and some of which (such as electronic mail and data processing) would not be cable services. . . . [T]he combined offering of a non-cable shop-at-home service with service that by itself met all the conditions for being a cable service would not transform the shop-at-home service into a cable service, or transform the cable service into a non-cable communications service”) (emphasis added).

<sup>130</sup> *Id.*, 1984 U.S.C.C.A.N. at 4679.

<sup>131</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act).

<sup>132</sup> 47 U.S.C. § 153(24).

<sup>133</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 320-321, para. 26-29.

<sup>134</sup> In addition, we note that the Commission has previously determined that an LFA is prohibited from assessing franchise fees on revenues from non-cable services. *See supra* para. 6 & note 24. As discussed above, requests from LFAs for in-kind contributions unrelated to the provision of cable services, such as requests for free or

to enforce requirements for “broad categories of video programming or other services,” when read in light of Section 624(b)(1) and the legislative history, we believe that Congress intended to bar LFAs from regulating information services.<sup>135</sup> We further note that under Section 624(b), “the franchising authority, to the extent related to the establishment or operation of a cable system ... may establish requirements for facilities and equipment.”<sup>136</sup> In light of our tentative finding that Section 624(b)(1) bars LFAs from regulating information services, we do not believe this provision authorizes LFAs to regulate facilities or equipment to the extent they are used to provide such services, including broadband Internet access service. We seek comment on this interpretation and our tentative conclusion. Would such an interpretation best effectuate the statutory purpose?<sup>137</sup> We also seek comment on the extent to which LFAs currently attempt to regulate the provision of information services by incumbent cable operators or the facilities and equipment used in the provision of such services. Do LFAs require incumbent cable operators to obtain a separate franchise or pay franchise fees in connection with their provision of broadband Internet access or other information services, and if so, what are the circumstances and rationale for such requirements? What other franchise requirements do LFAs impose on information services provided by incumbent cable operators? What effect, if any, do such franchise requirements have on the deployment of new information services, including broadband Internet access service?

29. In any event, we believe that LFA regulation of such services would be inconsistent with longstanding federal policy. The Commission has previously concluded that broadband Internet access service is “a jurisdictionally interstate service because ‘a substantial portion of Internet traffic involves accessing interstate or foreign websites.’”<sup>138</sup> Therefore, we tentatively conclude that LFAs may not regulate such interstate services and that doing so would frustrate the light-touch information service framework established by Congress that the Commission has previously found necessary to promote investment and innovation.<sup>139</sup> In the *Restoring Internet Freedom Order*, the Commission concluded that

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discounted broadband Internet access service, are permissible but are subject to the statutory five percent franchise fee cap. See *supra* para. 5 and accompanying notes.

<sup>135</sup> The limitation on the authority of LFAs in Section 624(b)(1) extends specifically to “information services” whereas the authority granted to LFAs in (b)(2) makes no mention of “information services.” Compare 47 U.S.C. § 544(b)(1) (prohibiting LFAs from establishing “requirements for video programming or other *information services*”) with 47 U.S.C. § 544(b)(2)(B) (permitting LFAs to “enforce any requirements contained within the franchise” “for broad categories of video programming or other service”) (emphasis added). See *Russello v. United States*, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (internal quotation marks omitted). Moreover, the legislative history explains that the LFA’s “ability to enforce provisions related to program service assures the franchising authority that commitments made in an arms-length situation will be met, yet also protects the cable operator from being forced to provide specific programming or items of value which are not utilized in the operation of the cable system.” H.R. Rep. No. 98-934, 1984 U.S.C.C.A.N. at 4706.

<sup>136</sup> 47 U.S.C. § 544(b)(1). The term “cable system” means “a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service....” *Id.* § 522(7). The term “cable service” means “(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.” *Id.* § 522(6).

<sup>137</sup> See *supra* note 100.

<sup>138</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 439, para. 199.

<sup>139</sup> *Id.* at 312, para. 1-2. See also Section 706 of the 1996 Act, 47 U.S.C. § 1302(a) (directing the Commission to promote deployment of advanced telecommunications capability to all Americans “by utilizing, in a manner consistent with the public interest, convenience and necessity, price-cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment”); *id.* § 1302(b) (“If the Commission’s determination” under an annual inquiry into deployment of advanced telecommunications capability “is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers”; *id.* § 230(b)(2) (stating that it is the policy of the United States

“regulation of broadband Internet access service should be governed principally by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements.”<sup>140</sup> The Commission found that allowing state and local governments to regulate broadband Internet access service could disrupt the procompetitive, deregulatory goals of the federal regulatory regime and impair the provision of broadband Internet access service by requiring each provider to comply with a patchwork of separate and potentially conflicting requirements across all of the different jurisdictions in which it operates.<sup>141</sup> The Commission therefore preempted any state or local measures that would impose rules or requirements that it had repealed or decided to refrain from imposing in that order or that would impose more stringent requirements for any aspect of broadband service addressed in that order.<sup>142</sup> Among other things, the Commission expressly preempted any “economic” or “public utility-type” regulations, including entry and exit restrictions.<sup>143</sup> For similar reasons, we tentatively conclude that entry and exit restrictions include a requirement that an incumbent cable operator obtain a franchise to provide broadband Internet access service and that LFAs therefore are expressly preempted from requiring incumbent cable operators to obtain franchises to provide broadband Internet access service. We seek comment on this tentative conclusion. We also seek comment on whether there are other regulations imposed by LFAs on incumbent cable operators’ provision of broadband Internet access service that should be considered entry and exit restrictions, or other types of economic or public utility-type regulations, preempted by the Commission.

30. Moreover, we tentatively conclude that it would be contrary to the goals of the Communications Act to permit LFAs to treat incumbent cable operators that are not also common carriers differently than incumbent cable operators and new entrants that are also common carriers in their provision of information services, including broadband Internet access services. Incumbent cable operators and new entrants (whether they are common carriers or non-common carriers) often compete against each other in the same markets, and often provide nearly identical services to consumers. Thus, to regulate incumbent cable operators that are not also common carriers more strictly, by permitting LFAs to place franchise requirements on their non-cable services and assess fees on these services, could put these incumbents at a competitive disadvantage that Section 621 was intended to avoid. This competitive disadvantage could impact not only the incumbents’ provision of broadband Internet access and other information services, but also their provision of cable services. Such a result could ultimately have a negative impact on consumers, thereby undermining the goal of the Telecommunications Act of 1996 Act to “promote competition” across communications providers and “to secure lower prices and higher quality services for American telecommunications consumers” by reducing regulation.<sup>144</sup> We seek comment on this analysis.<sup>145</sup>

31. Finally, we seek comment on whether there are any other statutory provisions that relate to the authority of LFAs to regulate the provision of non-cable services offered over a cable system by an incumbent cable operator or the facilities and equipment used in the provision of such services. For example, NCTA cites several additional provisions in support of its assertion that the Commission should

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“to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation”).

<sup>140</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 426-27, para. 194; *id.* at 429-432, paras. 197-204 (discussing the Commission’s legal authority to preempt inconsistent state and local regulation of broadband Internet access service).

<sup>141</sup> *Id.* at 426-27, para. 194.

<sup>142</sup> *Id.* at 428, para. 195.

<sup>143</sup> *Id.*

<sup>144</sup> Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act).

<sup>145</sup> We believe these same concerns would apply to new entrants that are not common carriers and seek comment on this analysis with respect to such entities.

apply the mixed-use network ruling to incumbent cable operators<sup>146</sup>; Section 621(a)(2) of the Act<sup>147</sup>; Section 622 of the Act<sup>148</sup>; Section 624(e) of the Act<sup>149</sup>; Section 230(b) of the Act<sup>150</sup>; and Section 253 of the Act.<sup>151</sup> We seek comment on the extent to which these and any other relevant statutory provisions relate

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<sup>146</sup> In addition to the listed statutory provisions, NCTA also points to Section 706 of the 1996 Act, asserting that this provision reflects “congressional intent to reduce local barriers to competition and to promote the provision of information services.” NCTA May 3, 2018 *Ex Parte* Letter at 6-7. See 47 U.S.C. § 1302(a) (directing the FCC to encourage the deployment on a reasonable and timely basis of broadband to all Americans by “remov[ing] barriers to infrastructure investment”). We note, however, that in the *Restoring Internet Freedom Order*, the Commission found that “the directives to the Commission in section 706(a) and (b) of the 1996 Act to promote deployment of advanced telecommunications capability are better interpreted as hortatory, and not as grants of regulatory authority.” *Restoring Internet Freedom Order*, 33 FCC Rcd at 470, para. 268.

<sup>147</sup> NCTA May 3, 2018 *Ex Parte* Letter at 3-4 (asserting that Section 621(a)(2) grants franchised cable operators the right to construct and operate a cable system in the public rights-of-way and, therefore, “delivering non-cable services over a cable system is within the scope of the rights that Congress intended a cable franchise to grant and LFAs may not impose additional burdens on the provision of non-cable services over a franchised cable system”). See 47 U.S.C. § 541(a)(2) (“Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses . . .”). In contrast, LFAs argue that they have a legitimate interest in regulating the use of public rights-of-way by cable operators for non-cable services. See, e.g., Letter from Janine Hill, Communications Administrator, City of Bloomington, Minnesota, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 3 (Aug. 23, 2018) (City of Bloomington *Ex Parte* Letter); Letter from Patty Latham, Chair, Southwest Suburban Cable Commission, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2-3 (Aug. 21, 2018) (SWSCC *Ex Parte* Letter); Letter from George Tourville, Mayor, Inver Grove Heights, Minnesota and Chair, Northern Dakota County Cable Communications Commission, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 3 (Aug. 20, 2018) (NDC4 *Ex Parte* Letter).

<sup>148</sup> NCTA May 3, 2018 *Ex Parte* Letter at 5 (asserting that Section 622 reinforces the Commission’s authority to prohibit LFAs from imposing unwarranted and duplicative fees on franchised cable operators that offer non-cable services over their cable systems). See 47 U.S.C. § 542(b) (“For any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator’s gross revenues derived in such period from the operation of the cable system to provide cable services”); *id.* § 542(g)(1) (defining “franchise fee” to include “any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such”). LFAs assert that while federally-authorized cable franchise fees are fair and reasonable compensation for the use of public rights-of-way for the operation of a cable system to provide cable services, Congress has not determined that the payment of the cable franchise fee is fair and reasonable compensation for the use of the public rights-of-way to provide non-cable services. City of Bloomington *Ex Parte* Letter at 4; SWSCC *Ex Parte* Letter at 3; NDC4 *Ex Parte* Letter at 4.

<sup>149</sup> Letter from Tara M. Corvo, Counsel for NCTA, to Marlene H. Dortch, Secretary, FCC, at 1 (Sept. 20, 2018) (asserting that Section 624(e) prohibits LFAs from regulating the facilities and equipment used to offer non-cable services over franchised cable systems) (NCTA Sept. 20, 2018 *Ex Parte* Letter); NCTA May 3, 2018 *Ex Parte* Letter at 3 n.14 (asserting that “Section 624(e) further promotes innovative uses of cable systems. . . . As amended in 1996, that provision prohibits local governments from limiting the use of particular transmission technologies or subscriber equipment, in order to avoid ‘the patchwork of regulations that would result from a locality-by-locality approach,’ which would be ‘particularly inappropriate in today’s intensely dynamic technological environment.’”) (quoting H.R. Rep. No. 104-204, at 110 (1995), as reprinted in 1996 U.S.C.C.A.N. 11, 78). See 47 U.S.C. § 544(e) (stating that “[n]o State or franchising authority may prohibit, condition, or restrict a cable system’s use of . . . any transmission technology.”).

<sup>150</sup> NCTA May 3, 2018 *Ex Parte* Letter at 6-7 (asserting that Section 230(b) embodies “congressional intent to reduce local barriers to competition and to promote the provision of information services”). See 47 U.S.C. § 230(b) (stating that it is the policy of the United States to “promote the continued development of the Internet” and to “preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation”).

<sup>151</sup> NCTA May 3, 2018 *Ex Parte* Letter at 7-8 (asserting that “requiring further ‘compensation’ from cable operators who already pay more than ‘fair and reasonable compensation’ for their use of the public ROW in franchise fees,

to the authority of LFAs to regulate the provision of non-cable services offered over a cable system by an incumbent cable operator.

### C. State Franchising Regulations

32. We seek comment on whether to apply the proposals and tentative conclusions set forth herein, as well as the Commission's decisions in the *First Report and Order*<sup>152</sup> and *Second Report and Order*,<sup>153</sup> as clarified in the *Order on Reconsideration*,<sup>154</sup> to franchising actions taken at the state level and state regulations that impose requirements on local franchising.<sup>155</sup> As explained above, the Commission limited its decisions in the *First Report and Order* and *Second Report and Order* to actions or inactions at the local level where a state has not specifically circumscribed the LFA's authority, finding that many of the state franchising laws had been in effect for only a short period of time and that it did not have a

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PEG access, institutional networks, and other obligations cannot be 'fair and reasonable,' or 'competitively neutral and nondiscriminatory'" under Section 253, particularly where the provision of new services has no incremental impact on the public ROW). See also 47 U.S.C. § 253(a) ("No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."); *id.* § 253(c) ("Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."). We note that in the Wireline Infrastructure proceeding, we found that express and *de facto* moratoria violate Section 253(a) and generally do not fall within the Section 253(b) and (c) exceptions because such moratoria prohibit or have the effect of prohibiting the deployment of telecommunications services or facilities. See *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, FCC 18-111, paras. 140-68 (rel. Aug. 3, 2018). We are considering the interplay between Section 253 preemption authority and state and local actions that prohibit or have the effect of prohibiting telecommunications service. See *id.* para. 149 n.551, para. 150 n.556, para. 159 n.586; *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266, 3296-3302, paras. 100-114 (2017); see also *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330, 3336-37, paras. 15-16 (2017).

<sup>152</sup> In the *First Report and Order*, the Commission adopted time limits for LFAs to render a final decision on a new entrant's franchise application and established a remedy for applicants that do not receive a decision within the applicable time frame; concluded that it was unlawful for LFAs to refuse to grant a franchise to a new entrant on the basis of unreasonable build-out mandates; clarified which revenue-generating services should be included in a new entrant's franchise fee revenue base and which franchise-related costs should and should not be included within the statutory five percent franchise fee cap; concluded that LFAs may not make unreasonable demands of new entrants relating to PEG channels and I-Nets; adopted the mixed-use network ruling for new entrants; and preempted local franchising laws, regulations, and agreements to the extent they conflict with the rules adopted in that order. *First Report and Order*, 22 FCC Rcd at 5134-40, paras. 66-81; *id.* at 5143-44, paras. 89-90; *id.* at 5144-51, paras. 94-109; *id.* at 5151-54, paras. 110-120; *id.* at 5155-56, paras. 121-24; *id.* at 5157-64, paras. 125-38.

<sup>153</sup> In the *Second Report and Order*, the Commission extended to incumbent cable operators the rulings in the *First Report and Order* relating to franchise fees and mixed-use networks and the PEG and I-Net rulings that were deemed applicable to incumbent cable operators, i.e., the findings that the non-capital costs of PEG requirements must be offset from the cable operator's franchise fee payments, that it is not necessary to adopt standard terms for PEG channels, and that it is not *per se* unreasonable for LFAs to require the payment of ongoing costs to support PEG, so long as such support costs as applicable are subject to the franchise fee cap. *Second Report and Order*, 22 FCC Rcd at 19637-41, paras. 10-17. We seek comment on whether these rulings should apply to state franchising as well.

<sup>154</sup> *Order on Reconsideration*, 30 FCC Rcd at 812-13, para. 7.

<sup>155</sup> NCTA Sept. 20, 2018 *Ex Parte* Letter at 1 (asserting that franchising authorities at both the state and local levels seek fees that exceed five percent of gross cable revenues, as well as substantial in-kind contributions, and urging the Commission to seek further comment on the applicability of the proposed rules to state as well as local franchising authorities).

sufficient record to apply these decisions to franchising decisions where a state is involved.<sup>156</sup> The Commission, however, indicated that it would revisit this issue in the future if it received evidence that the findings in the *First Report and Order* and/or the *Second Report and Order* were of practical relevance to the franchising process at the state level.<sup>157</sup> More than ten years has passed since the Commission first considered whether to apply its decisions interpreting Section 621(a)(1) to state-level franchising actions and state regulations that impose requirements on local franchising. Accordingly, we invite comment on whether we should apply the proposals and tentative conclusions discussed above, as well as any or all aspects of the Commission's decisions in the *First Report and Order* and *Second Report and Order*, to state level franchising actions and state regulations that impose requirements on local franchising. Is there any statutory basis to maintain the distinction between state-level franchising actions and local franchising actions? Do state level franchising actions or state regulations governing the local franchise process today impede competition or discourage investment in infrastructure that can be used to provide services, including video, voice, and broadband Internet access service, to consumers?

#### IV. PROCEDURAL MATTERS

##### A. Initial Regulatory Flexibility Analysis

33. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>158</sup> the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) relating to this Second FNPRM. The IRFA is set forth in Appendix A.

##### B. Initial Paperwork Reduction Act Analysis

34. This document does not contain any proposed information collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

##### C. Ex Parte Rules

35. Permit-But-Disclose. This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission's *ex parte* rules.<sup>159</sup> Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment

<sup>156</sup> *First Report and Order*, 22 FCC Rcd at 5102 n.2; *Order on Reconsideration*, 30 FCC Rcd at 812-13, para. 7.

<sup>157</sup> *Order on Reconsideration*, 30 FCC Rcd at 812-13, para. 7.

<sup>158</sup> *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

<sup>159</sup> 47 CFR §§ 1.1200 *et seq.*

filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

#### D. Filing Requirements

36. Comments and Replies. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12<sup>th</sup> Street, SW, TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12<sup>th</sup> Street, SW, Washington, DC 20554.

37. Availability of Documents. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12<sup>th</sup> Street, SW, CY-A257, Washington, DC 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

38. People with Disabilities. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

#### E. Additional Information

39. For additional information on this proceeding, contact Kathy Berthot, [Kathy.Berthot@fcc.gov](mailto:Kathy.Berthot@fcc.gov), of the Media Bureau, Policy Division, (202) 418-2120.

#### V. ORDERING CLAUSES

40. Accordingly, **IT IS ORDERED** that, pursuant to the authority found in sections 1, 4(i), 303, 602, 621, 622, and 624 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303, 522, 541, 542, and 544, this Second Further Notice of Proposed Rulemaking **IS ADOPTED**.

41. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental

Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

## APPENDIX A

## Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) concerning the possible significant economic impact on small entities by the policies and rules proposed in the *Second Further Notice of Proposed Rulemaking (Second FNPRM)*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the *Second FNPRM*. The Commission will send a copy of the *Second FNPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).<sup>2</sup> In addition, the *Second FNPRM* and IRFA (or summaries thereof) will be published in the Federal Register.<sup>3</sup>

**A. Need for, and Objectives of, the Proposed Rules**

2. Section 621(a)(1) of the Communications Act of 1934, as amended, (Act) prohibits local franchising authorities (LFAs) from unreasonably refusing to award competitive franchises for the provision of cable television services.<sup>4</sup> The Commission has adopted rules implementing Section 621(a)(1), including rules governing the treatment of certain costs and fees charged to cable operators by LFAs and LFAs' regulation of cable operators' "mixed-use" networks (i.e., facilities used to provide both cable services and non-cable services).<sup>5</sup> In *Montgomery County, Md. et al. v. FCC*, the United States Court of Appeals for the Sixth Circuit addressed challenges to these rules.<sup>6</sup> The court directed the Commission on remand to provide an explanation for its decision to treat cable-related, in-kind contributions charged to cable operators by LFAs as "franchise fees" subject to the statutory five percent cap on franchise fees set forth in Section 622(g) of the Act.<sup>7</sup> The court also directed the Commission to provide a statutory basis for its decision to extend its "mixed-use" ruling—which prohibits LFAs from regulating the provision of services other than cable services offered over cable systems used to provide both cable services and non-cable services—to incumbent cable operators that are not common carriers.<sup>8</sup>

3. The *Second FNPRM* tentatively concludes that cable-related, in-kind contributions required by LFAs from cable operators as a condition or requirement of a franchise agreement should be treated as "franchise fees" subject to the statutory five percent franchise fee cap set forth in Section 622 of the Act, with limited exceptions. For any franchise granted prior to 1984, Section 622(g)(2)(B) contains

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (CWAAA).

<sup>2</sup> See 5 U.S.C. § 603(a).

<sup>3</sup> See *id.*

<sup>4</sup> 47 U.S.C. § 541(a)(1).

<sup>5</sup> *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2007) (*First Report and Order*), *aff'd sub nom. Alliance for Community Media et al. v. FCC*, 529 F.3d 763 (6th Cir. 2008) (*Alliance*), *cert. denied*, 557 U.S. 904 (2009); *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order, 22 FCC Rcd 19633 (2007) (*Second Report and Order*), *recon. granted in part, denied in part, Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Order on Reconsideration, 30 FCC Rcd 810 (2015) (*Order on Reconsideration*).

<sup>6</sup> *Montgomery County, Md. et al. v. FCC*, 863 F.3d 485 (6th Cir. 2017).

<sup>7</sup> *Id.* at 491-92.

<sup>8</sup> *Id.* at 493.

an exclusion for PEG support payments.<sup>9</sup> For any franchise granted after 1984, Section 622(g)(2)(C) contains a narrow exclusion covering in-kind, cable related payments for “capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental [PEG] access facilities.”<sup>10</sup> Accordingly, the *Second FNPRM* tentatively concludes that PEG support payments required by franchises granted prior to 1984 and PEG capital costs required by franchises granted after 1984 are cable-related, in-kind contributions excluded from the five percent cap. The *Second FNPRM* also tentatively concludes that this treatment of cable-related, in-kind contributions should be applied to both new entrants and incumbent cable operators. The *Second FNPRM* tentatively concludes that doing so would ensure a more level playing field and that the FCC should not place its thumb on the scale to give a regulatory advantage to any competitor.

4. The *Second FNPRM* proposes to define “cable-related, in-kind contributions” to include “any non-monetary contributions related to the provision of cable services provided by cable operators as a condition or requirement of a local franchise agreement, such as free or discounted cable services, and the use of cable facilities or equipment. It does not include the cost of franchise obligations that do not directly benefit the LFA, including, but not limited to, build-out requirements.” The *Second FNPRM* further proposes that cable-related, in-kind contributions be valued for purposes of the franchise fee cap at their fair market value.

5. Additionally, the *Second FNPRM* tentatively concludes that the mixed-use network ruling should be applied to incumbent cable operators to the extent that they offer or begin offering non-cable services, prohibiting LFAs from using their video franchising authority to regulate certain non-cable services offered over cable systems by incumbent cable operators. The *Second FNPRM* tentatively concludes that the mixed-use network ruling prohibits LFAs from regulating the provision of any services other than cable services offered over the cable systems of incumbent cable operators that are common carriers. Further, the *Second FNPRM* tentatively concludes that LFAs may not use their franchising authority to regulate incumbent cable operators’ provision of information services, including broadband Internet access service. The *Second FNPRM* also tentatively concludes that consistent with the Commission’s decision in the *Restoring Internet Freedom Order*, which preempted any state or local measures that would impose rules or requirements that the Commission repealed or decided to refrain from imposing in that order or that would impose more stringent requirements for any aspect of broadband service addressed in that order, LFAs are expressly preempted from requiring incumbent cable operators to obtain franchises to provide broadband Internet access service.<sup>11</sup>

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<sup>9</sup> 47 U.S.C. § 542(g)(2)(B) (excluding from the term “franchise fee” “in the case of any franchise in effect on the date of the enactment of this title, payments which are required by the franchise to be made by the cable operator during the term of such franchise for, or in support of the use of, public, educational, or governmental access facilities”) (emphasis added).

<sup>10</sup> 47 U.S.C. § 542(g)(2)(C) (excluding from the term “franchise fee” “in the case of any franchise granted after such date of enactment, capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities”) (emphasis added). Section 611 of the Act authorizes a franchising authority to require a cable operator, as part of a franchise, to designate channel capacity for public, educational, or governmental [PEG] use. *Id.* § 531.

<sup>11</sup> *Restoring Internet Freedom Order*, 33 FCC Rcd at 428, para. 195. The *Second FNPRM* also explains that the Commission views its proposals in this proceeding as part of its larger, ongoing effort to implement statutory requirements to reduce regulatory barriers to infrastructure investment. See generally *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, 32 FCC Rcd 11128 (2017) (enacting reforms to the rules and procedures regarding pole attachments, copper retirement, and discontinuances of legacy services to better enable providers to invest in next generation networks); *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, FCC 18-30 (Mar. 30, 2018) (revising the rules and procedures for deployments subject to the National Historic Preservation Act and National Environmental Policy Act to enable and to speed the deployment of wireless service throughout America); *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, 32 FCC Rcd 9760 (2017) (making changes to the historic preservation review requirement for replacement utility poles); *Accelerating*

6. The *Second FNPRM* also seeks comment on whether to apply the proposals and tentative conclusions discussed in the instant proceeding, as well as the Commission's decisions in the *First Report and Order*<sup>12</sup> and *Second Report and Order*,<sup>13</sup> as clarified in the *Order on Reconsideration*,<sup>14</sup> to franchising actions taken at the state level and state regulations imposing requirements on local franchising.

**B. Legal Basis**

7. The proposed action is authorized pursuant to sections 1, 4(i), 303, 602, 621, 622, and 624 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303, 522, 541, 542, and 544.

**C. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply**

8. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.<sup>15</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>16</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>17</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>18</sup> Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

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*Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Public Notice, 32 FCC Red 10715 (2017) (seeking comment on a proposal that would make existing infrastructure available for additional wireless deployments on towers that previously have been unavailable).

<sup>12</sup> In the *First Report and Order*, the Commission adopted time limits for LFAs to render a final decision on a new entrant's franchise application and established a remedy for applicants that do not receive a decision within the applicable time frame; concluded that it was unlawful for LFAs to refuse to grant a franchise to a new entrant on the basis of unreasonable build-out mandates; clarified which revenue-generating services should be included in a new entrant's franchise fee revenue base and which franchise-related costs should and should not be included within the statutory five percent franchise fee cap; concluded that LFAs may not make unreasonable demands of new entrants relating to PEG channels and I-Nets; adopted the mixed-use network ruling for new entrants; and preempted local franchising laws, regulations, and agreements to the extent they conflict with the rules adopted in that order. *First Report and Order*, 22 FCC Red at 5134-40, paras. 66-81; *id.* at 5143-44, paras. 89-90; *id.* at 5144-51, paras. 94-109; *id.* at 5151-54, paras. 110-120; *id.* at 5155-56, paras. 121-24; *id.* at 5157-64, paras. 125-38.

<sup>13</sup> In the *Second Report and Order*, the Commission extended to incumbent cable operators the rulings in the *First Report and Order* relating to franchise fees and mixed-use networks and the PEG and I-Net rulings that were deemed applicable to incumbent cable operators, i.e., the findings that the non-capital costs of PEG requirements must be offset from the cable operator's franchise fee payments, that it is not necessary to adopt standard terms for PEG channels, and that it is not *per se* unreasonable for LFAs to require the payment of ongoing costs to support PEG, so long as such support costs as applicable are subject to the franchise fee cap. *Second Report and Order*, 22 FCC Red at 19637-41, paras. 10-17.

<sup>14</sup> *Order on Reconsideration*, 30 FCC Red at 812-13, para. 7.

<sup>15</sup> 5 U.S.C. § 603(b)(3).

<sup>16</sup> *Id.* § 601(6).

<sup>17</sup> *Id.* § 601(3) (incorporating by reference the definition of "small-business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

<sup>18</sup> 15 U.S.C. § 632.

9. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three broad groups of small entities that could be directly affected herein.<sup>19</sup> First, while there are industry specific standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA’s Office of Advocacy, in general a small business is an independent business having fewer than 500 employees.<sup>20</sup> These types of small businesses represent 99.9% of all businesses in the United States which translates to 28.8 million businesses.<sup>21</sup>

10. Next, the type of small entity described as a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”<sup>22</sup> Nationwide, as of Aug 2016, there were approximately 356,494 small organizations based on registration and tax data filed by nonprofits with the Internal Revenue Service (IRS).<sup>23</sup>

11. Finally, the small entity described as a “small governmental jurisdiction” is defined generally as “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”<sup>24</sup> U.S. Census Bureau data from the 2012 Census of Governments<sup>25</sup> indicates that there were 90,056 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States.<sup>26</sup> Of this number there were 37,132 General purpose governments (county,<sup>27</sup> municipal and town or township<sup>28</sup>) with populations of

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<sup>19</sup> See 5 U.S.C. § 601(3)-(6).

<sup>20</sup> See SBA, Office of Advocacy, “Frequently Asked Questions, Question 1 – What is a small business?” [https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016\\_WEB.pdf](https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf) (June 2016)

<sup>21</sup> See SBA, Office of Advocacy, “Frequently Asked Questions, Question 2- How many small businesses are there in the U.S.?” [https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016\\_WEB.pdf](https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf) (June 2016).

<sup>22</sup> 5 U.S.C. § 601(4).

<sup>23</sup> Data from the Urban Institute, National Center for Charitable Statistics (NCCS) reporting on nonprofit organizations registered with the IRS was used to estimate the number of small organizations. Reports generated using the NCCS online database indicated that as of August 2016 there were 356,494 registered nonprofits with total revenues of less than \$100,000. Of this number, 326,897 entities filed tax returns with 65,113 registered nonprofits reporting total revenues of \$50,000 or less on the IRS Form 990-N for Small Exempt Organizations and 261,784 nonprofits reporting total revenues of \$100,000 or less on some other version of the IRS Form 990 within 24 months of the August 2016 data release date. See <http://nccs.urban.org/sites/all/nccs-archive/html/tablewiz/tw.php> where the report showing this data can be generated by selecting the following data fields: Show: “Registered Nonprofit Organizations”; By: “Total Revenue Level (years 1995, Aug to 2016, Aug)”; and For: “2016, Aug” then selecting “Show Results”.

<sup>24</sup> 5 U.S.C. § 601(5).

<sup>25</sup> See 13 U.S.C. § 161. The Census of Government is conducted every five (5) years compiling data for years ending with “2” and “7”. See also Program Description Census of Government <https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=program&id=program.en.COG#>

<sup>26</sup> See U.S. Census Bureau, 2012 Census of Governments, Local Governments by Type and State: 2012 - United States-States. <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>. Local governmental jurisdictions are classified in two categories - General purpose governments (county, municipal and town or township) and Special purpose governments (special districts and independent school districts).

<sup>27</sup> See U.S. Census Bureau, 2012 Census of Governments, County Governments by Population-Size Group and State: 2012 - United States-States. <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>. There were 2,114 county governments with populations less than 50,000.

<sup>28</sup> See U.S. Census Bureau, 2012 Census of Governments, Subcounty General-Purpose Governments by Population-Size Group and State: 2012 - United States – States.

less than 50,000 and 12,184 Special purpose governments (independent school districts<sup>29</sup> and special districts<sup>30</sup>) with populations of less than 50,000. The 2012 U.S. Census Bureau data for most types of governments in the local government category shows that the majority of these governments have populations of less than 50,000.<sup>31</sup> Based on this data we estimate that at least 49,316 local government jurisdictions fall in the category of “small governmental jurisdictions.”<sup>32</sup>

12. *Wired Telecommunications Carriers.* The U.S. Census Bureau defines this industry as “establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.”<sup>33</sup> The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.<sup>34</sup> U.S. Census data for 2012 shows that there were 3,117 firms that operated that year.<sup>35</sup> Of this total, 3,083 operated with fewer than 1,000 employees.<sup>36</sup> Thus, under this size standard, the majority of firms in this industry can be considered small.

13. *Cable Companies and Systems (Rate Regulation Standard).* The Commission has developed its own small business size standards, for the purpose of cable rate regulation. Under the

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<https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>. There were 18,811 municipal and 16,207 town and township governments with populations less than 50,000.

<sup>29</sup> See U.S. Census Bureau, 2012 Census of Governments, Elementary and Secondary School Systems by Enrollment-Size Group and State: 2012 - United States-States.

<https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>. There were 12,184 independent school districts with enrollment populations less than 50,000.

<sup>30</sup> See U.S. Census Bureau, 2012 Census of Governments, Special District Governments by Function and State: 2012 - United States-States.

<https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>. The U.S. Census Bureau data did not provide a population breakout for special district governments.

<sup>31</sup> See U.S. Census Bureau, 2012 Census of Governments, County Governments by Population-Size Group and State: 2012 - United States-States -

<https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>; Subcounty General-Purpose Governments by Population-Size Group and State: 2012 - United States-States -

<https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>; and Elementary and Secondary School Systems by Enrollment-Size Group and State: 2012 - United States-States.

<https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>. While U.S. Census Bureau data did not provide a population breakout for special district governments, if the population of less than 50,000 for this category of local government is consistent with the other types of local governments the majority of the 38, 266 special district governments have populations of less than 50,000.

<sup>32</sup> *Id.*

<sup>33</sup> See 13 CFR § 120.201. The Wired Telecommunications Carrier category formerly used the NAICS code of 517110. As of 2017 the U.S. Census Bureau definition shows the NAICS code as 517311 for Wired Telecommunications Carriers. See <https://www.census.gov/cgi-in/sssd/naics/naicsrch?code=517311&search=2017>.

<sup>34</sup> 13 CFR § 201.121.

<sup>35</sup> See U.S. Census Bureau, 2012 Economic Census of the United States, Table No. EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms: 2012* (517110 Wired Telecommunications Carriers). [https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012\\_US/51SSSZ5//naics~517110](https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517110).

<sup>36</sup> *Id.*

Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.<sup>37</sup> Industry data indicate that, of 4,600 cable operators nationwide, all but 9 are small under this size standard.<sup>38</sup> In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.<sup>39</sup> Industry data indicate that, of 4,600 systems nationwide, 3,900 have fewer than 15,000 subscribers, based on the same records.<sup>40</sup> Thus, under this second size standard, the Commission believes that most cable systems are small.

14. *Cable System Operators.* The Act also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."<sup>41</sup> There are approximately 52,403,705 cable subscribers in the United States today.<sup>42</sup> Accordingly, an operator serving fewer than 524,037 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total revenues of all its affiliates, do not exceed \$250 million in the aggregate.<sup>43</sup> Based on the available data, we find that all but nine independent cable operators are affiliated with entities whose gross annual revenues exceed \$250 million.<sup>44</sup> Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million, we note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,<sup>45</sup> and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under the definition in the Communications Act.

15. *Open Video Services.* Open Video Service (OVS) systems provide subscription services.<sup>46</sup> The open video system framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.<sup>47</sup> The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,<sup>48</sup> OVS falls within the SBA small

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<sup>37</sup> 47 CFR § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

<sup>38</sup> The number of active, registered cable systems comes from the Commission's Cable Operations and Licensing System (COALS) database on August 15, 2015. See FCC, Cable Operations and Licensing Systems (COALS), [www.fcc.gov/coals](http://www.fcc.gov/coals) (last visited Oct. 25, 2016).

<sup>39</sup> 47 CFR § 76.901(c).

<sup>40</sup> See *supra* note 34.

<sup>41</sup> 47 U.S.C. § 543(m)(2); see also 47 CFR § 76.901(f) & nn.1–3.

<sup>42</sup> See SNL Kagan at <http://www.snl.com/interactivex/MultichannelIndustryBenchmaks.aspx>.

<sup>43</sup> 47 CFR § 76.901(f); see *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bur. 2001).

<sup>44</sup> See SNL Kagan at <http://www.snl.com/interactivex/TopCableMSOs.aspx>.

<sup>45</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules.

<sup>46</sup> See 47 U.S.C. § 573.

<sup>47</sup> *Id.* § 571(a)(3)-(4). *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 606, para. 135 (2009) (13<sup>th</sup> Annual Report).

<sup>48</sup> See 47 U.S.C. § 573.

business size standard covering cable services, which is “Wired Telecommunications Carriers.”<sup>49</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.<sup>50</sup> To gauge small business prevalence for the OVS service, the Commission relies on data currently available from the U.S. Census for the year 2012. According to that source, there were 3,117 firms that in 2012 were Wired Telecommunications Carriers. Of these, 3,083 operated with less than 1,000 employees. Based on this data, the majority of these firms can be considered small.<sup>51</sup> In addition, we note that the Commission has certified some OVS operators, with some now providing service.<sup>52</sup> Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises.<sup>53</sup> The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, at least some of the OVS operators may qualify as small entities. The Commission further notes that it has certified approximately 45 OVS operators to serve 116 areas, and some of these are currently providing service.<sup>54</sup> Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 44 OVS operators (those remaining) might qualify as small businesses that may be affected by the rules and policies adopted herein.

#### **D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements**

16. The rules proposed in the *Second FNPRM* would not impose any additional reporting or recordkeeping requirements and any compliance requirements imposed by the proposed rules are expected to have only a *de minimis* effect on small governmental jurisdictions. LFAs would continue to perform their role of reviewing and making decisions on applications for cable franchises and any modifications to the local franchising process resulting from the proposed rules would further streamline that process. The proposed rules would streamline the local franchising process by providing guidance as to the appropriate treatment of cable-related, in-kind contributions demanded by LFAs for purposes of the statutory five percent franchise fee cap, what constitutes “cable-related, in-kind contributions,” and how such contributions are to be valued. In addition, the proposed rules would streamline the local franchising process by making clear that LFAs may not use their video franchising authority to regulate the provision of certain non-cable services offered over cable systems by incumbent cable operators.

#### **E. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered**

17. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account

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<sup>49</sup> 13 CFR § 201.121. The Wired Telecommunications Carrier category formerly used the NAICS code of 517110. As of 2017 the U.S. Census Bureau definition shows the NAICS code as 517311 for Wired Telecommunications Carriers. See <https://www.census.gov/cgi-in/sssd/naics/naicsrch?code=517311&search=2017>.

<sup>50</sup> 13 CFR § 201.121.

<sup>51</sup> See U.S. Census Bureau, Table EC1251SSSZ5, <https://www.census.gov/cgi-in/sssd/naics/naicsrch?code=517311&search=2017>.

<sup>52</sup> A list of OVS certifications may be found at <https://www.fcc.gov/general/current-filings-certification-open-video-systems#block-menu-block-4>.

<sup>53</sup> See *13th Annual Report*, 24 FCC Rcd at 606-07, para. 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

<sup>54</sup> See <https://www.fcc.gov/general/current-filings-certification-open-video-systems#block-menu-block-4>.

the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance, rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.”<sup>55</sup>

18. To the extent that the proposed rules are matters of statutory interpretation, we tentatively find that the proposed rules are statutorily mandated and therefore no meaningful alternatives exist. Moreover, as noted above, the proposed rules are expected to have only a *de minimis* effect on small governmental jurisdictions. The proposed rules would streamline the local franchising process by providing additional guidance to LFAs.

19. In addition, the proposal to treat cable-related, in-kind contributions as “franchise fees” subject the statutory five percent franchise fee cap, with one limited exception, would benefit small cable operators by ensuring that LFAs do not circumvent the statutory five percent cap by demanding, for example, unlimited free or discounted services. This in turn would help to ensure that local franchising requirements do not deter small cable operators from investing in new services and facilities.

**F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rules**

20. None

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<sup>55</sup> 5 U.S.C. § 603(c)(1)-(4).

**STATEMENT OF  
COMMISSIONER MICHAEL O'RIELLY**

Re: *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311

The market for communications services is dramatically changing before our very eyes, making many parts of current law and Commission regulations vastly anachronistic. *Unregulated* over-the-top providers have achieved enormous popularity and success. For this and other reasons, I have endorsed efforts by Congress to rewrite the Communications Act, particularly Title VI, which governs a significant portion of the video services offered by traditional video providers. Moreover, I have pushed the Commission to update its own rules and internal structure to reflect the current and future marketplace for video and other services. With such a dynamic video marketplace and a shrinking role of franchise authorities, it is unsurprising that the latter entities are under intense pressure – both financial and political – to expand their reach outside their respective jurisdictions into various businesses and activities of local video franchisees. But such unauthorized expansion is wrong and must be curtailed.

After a remand from the United States Court of Appeals for the Sixth Circuit, this item appropriately and justifiably starts the procedural steps to prevent the overreach of franchise authorities in two instances. First, it correctly proposes to count cable-related “in kind” contributions against the cap on franchise fees. The absence of such a limitation leaves franchise authorities with the ability to end-run the fee cap, making a mockery of the law. And this isn’t simply a theoretical issue, as there are concrete instances in which franchise authorities have already abused their powers to force these “contributions.” Beyond violating their legal authority, such efforts have many destructive impacts, including directly increasing consumer costs and indirectly harming the ability of providers to deploy and offer service.

Second, the item properly seeks comment on the tentative conclusion that franchise authorities cannot impose regulatory burdens on incumbent non-cable services. Title VI only authorizes franchise authorities to oversee or regulate certain aspects of cable services, not other portions of a cable provider’s business. Without our action today, which is consistent with past Commission rulings, franchise authorities would be emboldened to intervene, impose mandates, extract concessions and more on host of services outside the scope of Congress’ directive. In fact, absent our action, it’s hard to see any boundaries to the meddling of franchise authorities, creating the perverse circumstance in which such non-cable services could be regulated by multiple governmental layers, generating confusing and conflicting obligations.

Consistent with this approach, I am pleased that the Chairman added my request to seek comment on whether statewide cable provider franchises should be subject to similar limitations as those enacted for local franchise authorities. Authorizing or implementing statewide franchising doesn’t eliminate the possibility of the same type of overreach inflicted by local franchise authorities, and we must curtail these efforts as well.

Lastly, I appreciate Chairman Pai’s willingness to expand our media modernization effort for cable services beyond the fairly technical items. Until recent life events took over, I had been working on a project to outline significant, substantive reforms that the Commission can and should pursue to reflect the current marketplace. While critical, some of these actions may require alterations of law, but doing so would provide a pathway for Congress to consider the same, if it was so inclined.